Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-2086–12 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
19 JANUARY 2017

Civil Procedure — Discovery — Pre-action — Respondent removed as beneficiary of trust created by respondent's late paternal grandfather — Respondent applied for pre-action discovery in relation to trust documents — Trial judge allowed application — Whether requirements under O 24 r 7A of the Rules of Court 2012 fulfilled — Whether just and fair to order disclosure — Rules of Court 2012 O 24 r 7A

The respondent had filed an application in the High Court for a pre-action discovery under O 24 r 7A of the Rules of Court 2012 ('the ROC'). The respondent had sought against the appellant for discovery, disclosure and/or inspection of certain trust documents in relation to or howsoever connected to the 'Tee Keong Family Trust' ('the trust'). The trust was created by the respondent's late paternal grandfather and the appellant in the present case was the trustee. Up until 18 March 2014, the respondent was one of the beneficiaries under the trust. With effect from 18 March 2014, the respondent was removed as a beneficiary pursuant to endorsement of memorandum No 8, hence the application. The appellant in opposing the application contended that the respondent's entire application was completely misconceived as the existing laws did not confer on the respondent, whether as a beneficiary or an erstwhile beneficiary, under a discretionary trust, a right to inspect the trust deed. The learned High Court judge found that it was just and fair to order disclosure and consequently, the learned judge allowed the application. Dissatisfied with the decision, the appellant filed the present appeal.

Held, dismissing the appeal with costs of RM30,000 and affirming the judgment of the learned High Court judge:

(1) The court agreed with the learned trial judge that the explanation proffered by the respondent met the requirements of O 24 r 7A of the ROC for pre-action discovery. Sight of the very document which created the respondent's entitlement and taking away of that entitlement was surely necessary and just to the issue of whether an exercise of exclusion was proper or otherwise. The contents of the trust deed would and should have the basic elements of a trust clearly set out, and the terms should address the respondent's queries and quandaries. The respondent had

further identified the appellant as the 'most likely party to the intended action' over his cessation or exclusion as beneficiary. The appellant undeniably had the trust deed in its possession, custody or power. All the terms and conditions of O 24 r 7A of the ROC were met. The order for disclosure was therefore entirely proper in law and on the facts (see paras 54–55).

[Bahasa Malaysia summary

Responden telah memfailkan permohonan di Mahkamah Tinggi untuk penemuan pra-tindakan di bawah A 24 k 7A Kaedah-Kaedah Mahkamah 2012 ('KM'). Responden telah memohon terhadap perayu untuk penemuan, penzahiran dan/atau pemeriksaan dokumen amanah tertentu berhubung dengan atau bagaimana pun berkaitan dengan 'Tee Keong Family Trust' ('amanah tersebut'). Amanah tersebut telah dibuat oleh mendiang datuk sebelah bapa dan perayu dalam kes ini adalah pemegang amanah. Sehingga 18 Mac 2014, responden adalah salah seorang daripada benefisiari di bawah amanah tersebut. Berkuat kuasa dari 18 Mac 2014, responden telah dikeluarkan sebagai benefisiari menurut pengindorsan memorandum No 8, justeru permohonan tersebut. Perayu dalam membantah permohonan tersebut menegaskan bahawa keseluruhan permohonan responden telah disalah tanggap sepenuhnya kerana undang-undang sedia ada tidak memberikan kepada responden, sama ada sebagai benefisiari atau benefisiari terdahulu, di bawah amanah berasaskan budi bicara, suatu hak untuk memeriksa surat ikatan amanah. Hakim Mahkamah Tinggi yang bijaksana mendapati bahawa ia adalah adil dan saksama untuk memerintahkan penzahiran dan akhirnya, hakim yang bijaksana telah membenarkan permohonan tersebut. Berasa tidak puas hati dengan keputusan tersebut, perayu telah memfailkan rayuan ini.

Diputuskan, menolak rayuan dengan kos RM30,000 dan mengesahkan penghakiman hakim Mahkamah Tinggi yang bijaksana:

(1) Mahkamah bersetuju dengan hakim perbicaraan yang bijaksana bahawa penjelasan yang diperuntukkan oleh responden memenuhi keperluan A 24 k 7A KM untuk penemuan pra-tindakan. Dengan melihat dokumen yang memberikan hak responden dan menghapuskan hak itu sememangnya perlu dan adil berhubung isu sama ada pelaksanaan pengecualian adalah wajar atau sebaliknya. Kandungan surat ikatan amanah akan dan patut mempunyai elemen-elemen asas amanah yang jelas menyatakan, dan terma-terma patut mengemukakan persoalan dan keterangan responden. Responden selanjutnya telah mengenalpasti perayu sebagai 'most likely party to the intended action' berhubung pemberhentian atau pengecualiannya sebagai benefisiari. Perayu tidak dinafikan mempunyai surat ikatan amanah itu dalam milikan, jagaan atau kuasanya. Semua terma dan syarat A 24 k 7A KM telah dipenuhi. Perintah untuk penemuan dengan itu penzahiran dengan itu adalah

A wajar sepenuhnya dari segi undang-undang dan fakta (lihat perengan 54–55).]

Notes

B For cases on pre-action, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3507–3513.

Cases referred to

Ahmad Zahri Mirza v PricewaterhouseCoopers Capital Sdn Bhd & Ors [2015] MLJU 878; [2015] 7 CLJ 930, HC (refd)

C *Anglo Irish Bank Corp plc v West LB A* [2009] EWHC 207 (Comm), QBD (refd)

Avanes v Marshall & Ors [2007] NSWSC 191, SC (refd)

Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd [2004] 4 SLR 39; [2004] 4 SLR (R) 39, HC (refd)

D *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] 1 SLR 321, HC (refd)

Breakspear and others v Ackland and another [2009] Ch 32, Ch D (refd)

Ching Mun Fong v Standard Chartered Bank [2012] 2 SLR 22, HC (refd)

E *Clarke v Earl of Ormonde* (1821) Jac 108 (refd)

Cowin v Gravettm, Re (1886) 33 Ch D 179, ChD (refd)

Dorsey James Michael v World Sport Group Pte Ltd [2014] 2 SLR 208, CA (refd)

Dunning v Board of Governors of the United Liverpool Hospitals [1973] 2 All ER 454, CA (refd)

F *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105, FC (refd)

Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405, CA (refd)

Kneale v Barclays Bank plc (trading as Barclaycard) [2010] EWHC 1900 (Comm) (refd)

Kuah Kok Kim & Ors v Ernst & Young (a firm) [1997] 1 SLR 169; [1996] 3 G SLR (R) 485, CA (refd)

Londonderry's Settlement, Re [1964] 3 All ER 855, CA (refd)

Millar and another v Hornsby and others 3 ITELR 81, SC (refd)

Ng Giok Oh and others v Sajjad Akhtar and others [2003] 1 SLR 375, HC (refd)

Norwich Pharmacal Co and others v Commissioners of Customs and Excise H [1973] 2 All ER 943; [1974] AC 133, HL (refd)

O'Rourke v Darbishire and Others [1920] AC 581, HL (refd)

Rouse and others v IOOF Australia Trustees Limited 2 ITELR 289, SC (refd)

Sandra Stuart Curwen & Ors v Vanbreck Pty Ltd (as Trustee for the WS and NR Harvey Family Trust) [2009] VSCA 284, CA (refd)

I *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, HL (refd)

Schreuders v Grandiflora Nominees Pty Ltd [2014] VSC 310, SC (refd)

The Internine Trust and the Intertraders Trust; Sheikh Abdullah Ali M Alhamrani v Russa Management Ltd and others, Re [2004] JCA 158, CA (refd)

Tillott Lee v Wilson, In Re [1892] 1 Ch 86, Ch D (refd)

Legislation referred to

Civil Procedure Rules [UK] O 85, Part 64, rr 31.16, 64.2(a), Part 8, Schedule 1
Rules of Court 2012 O 24, O 24 rr 6, 7A, 7A(3), 7A(7), 8, 13, O 80
Rules of the High Court 1980 O 24 rr 7A, 8, 13
Rules of the High Court of Justice of the Isle of Man 1952 [UK] O 41
Rules of the Supreme Court [UK] O 24 rr 7A, 8
Rules of the Supreme Court 1990 [SG] O 24 r 6

Appeal from: Originating Summons No 24NCVC-1489–10 of 2014 (High Court, Kuala Lumpur)

Sara Ann Chay Sue May (Noor Farhah bt Mustaffa with her) (Shafee & Co) for the appellant.
Yeoh Cho Keong (Jeffrey Lee Chi Hur with him) (Ranjit Singh & Yeoh) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The present appeal arises from the High Court's grant of the respondent's application for a pre-action discovery under O 24 r 7A of the Rules of Court 2012. The respondent had sought discovery, disclosure and/or inspection of certain trust documents in relation to or howsoever connected to the 'Tee Keong Family Trust' ('the trust'). The trust was created by the respondent's late paternal grandfather, Lim Goh Tong, who passed away in 2007. The trust was created and established under a deed of trust dated 18 May 1990, entered into between one Quah Chek Tin and the appellant, a company whose business is to act as a trustee. Lim Goh Tong had three sons and three daughters. His eldest son, Lim Tee Keong, after whom the trust is named, was the respondent's father. Lim Tee Keong passed away in April 2014. Lim Goh Tong's youngest son, Lim Chee Wah, is a director of the appellant.

[2] Up until 18 March 2014, the respondent was one of the beneficiaries under the trust. From time to time, the respondent received benefits under the trust. These benefits included fees, allowances, essentials such as school uniforms, stationeries and accommodation whilst the respondent was at boarding school and university abroad. With effect from 18 March 2014, the respondent was removed as a beneficiary pursuant to endorsement of memorandum No 8. The respondent who had never seen the trust deed, asked for sight of the trust deed. He was unsuccessful.

[3] The respondent first requested via email dated 21 July 2014 from one Gerard Lim. Gerard replied that he was not involved in the trust deed but indicated that he would nevertheless forward the respondent's request directly

to the appellant. By letter dated 19 August 2014, the appellant directed one Peter Yap Chong Chew to inform the respondent that he was no longer a discretionary beneficiary of the 'Tee Keong Family Trust' and was therefore not entitled to be considered for any benefits under the trust. The respondent was further told that he was no longer vested with a right to request for disclosure and was not entitled to disclosure. On 3 October 2014, the respondent sent an email directly to Peter Yap requesting for a copy of the trust deed to be provided by 7 October 2014. Peter Yap informed the respondent that he would not be responding to his request.

[4] This led to the respondent initiating proceedings in court seeking discovery under O 24 r 7A of the Rules of Court 2012. In his application, the respondent requested a copy of the trust deed and any other trust deed or instrument in relation to or howsoever connected to the 'Tee Keong Family Trust'. In support of his application, the respondent claimed that he was entitled to have sight of the trust deed in order to know, inter alia, whether or not he had been properly excluded as beneficiary as was alleged by the appellant. Discovery of the trust deed was necessary in order that he may take proper legal advice on whether the appellant had the power to exclude the respondent as a beneficiary and/or whether the respondent had exercised its powers, if at all exists, capriciously or unreasonably. In short, the respondent intended to challenge his removal as a beneficiary pursuant to memorandum No 8 dated 18 March 2014.

[5] The application was strongly opposed by the appellant. In his affidavit in reply, Lim Chee Wah, paternal uncle to the respondent and one of the directors of the appellant deposed that the respondent 'cannot be allowed to have the trust documents under which he is no longer a beneficiary, disclosed to him. The plaintiff simply no longer has the benefit or right of doing so'. Although it did not deny that the respondent was a named beneficiary under the trust deed, the appellant maintained that the respondent was not entitled to be furnished a copy of the trust deed on three principal grounds:

(a) pursuant to memorandum No 8, the respondent was no longer a beneficiary under the trust deed and therefore was no longer vested with a right, whether proprietary or otherwise, to request for disclosure of the trust documents;

(b) the appellant's duty as trustee and the exercise of its discretion under the trust deed is highly confidential; and

(c) the appellant's decision not to disclose the trust deed is in the best interests of all the beneficiaries and upon taking account of their competing interests, the disclosure of the trust deed to any of the beneficiaries will be severely prejudicial. Confidentiality of the trust

documents take precedence over disclosure because 'to disclose such document might cause infinite trouble to the family'. A

[6] A closer examination of the appellant's arguments reveal that the appellant objected to the application to discovery, whether the respondent was a current or ex beneficiary. According to the appellant, current beneficiaries are not entitled to disclosure of trust documents because they have no proprietary rights or interests in the trust documents. Even if the respondent had any right or interest to disclosure, he had since been 'effectively removed' as a discretionary beneficiary under the Tee Keong family trust vide endorsement of memorandum No 8 dated 18 March 2014. The respondent was now a stranger to the trust, no longer vested with a right, whether proprietary or otherwise, to request for disclosure of the trust documents. Consequently, the appellant argued that the respondent's entire application was completely misconceived as the existing laws do not confer on the respondent, whether as a beneficiary or an erstwhile beneficiary, under a discretionary trust, a right to inspect the trust deed. The very nature of a discretionary trust and the objectives that such a document seeks to achieve was said to militate against the grant of discovery. Several case authorities was relied on by the appellant in support of its contention. B C D E

[7] Her Ladyship rejected all three reasons proffered by the appellant after perusing the trust deed which she sought sight. Her Ladyship was furnished with a copy of the trust deed on the basis of 'for my eyes only'. F

[8] First, on the matter of power to order disclosure or discovery of the trust deed, the High Court examined O 24 r 7A and O 80 of the Rules of Court 2012 to find the necessary discretionary power. The question was one of appropriateness in ordering disclosure. Based on the case authorities cited by both sides, the High Court found that the respondent, as a beneficiary, generally has a right to seek disclosure of the trust documents since a beneficiary is entitled to the protection of the court under its supervisory jurisdiction. On the matter of disruption and that disclosure is 'highly prejudicial', the court did not consider the reasons of merit given the lack of explanations and elaboration on how a disclosure 'shall have such an impact', especially after perusing the copy of the trust deed. Seen in its 'proper perspective, in that all the plaintiff is asking here is to have a copy of the trust deed dated 18 May 1990 in which he was, before his removal, a beneficiary'; and that at this stage, the respondent was 'merely seeking to have sight of the trust deed and to make copy thereof; no more no less'; that the respondent was not seeking for the disclosure of the reasons behind the exercise of discretion in removing the respondent as a beneficiary; that whether or not the respondent would file an action subsequently to challenge his removal as beneficiary was a 'separate matter'; and that the issue of whether he was properly removed or G H I

otherwise 'is not yet an issue'; the respondent's application was accordingly allowed on terms.

[9] Although agreeing that confidentiality of the trust documents is an important consideration when determining whether or not a trustee should make disclosure of information relating to the trust, Her ladyship was nevertheless of the opinion that confidentiality should be weighed or balanced with the right of the beneficiary or ex-beneficiary, in wanting to know his rights and entitlement under the trust deed. According to Her Ladyship, 'it is just and fair that the respondent be allowed to know that his removal as a beneficiary was done in accordance with the provisions of the trust deed, and he can only know that if he has sight of that trust deed'. Consequently, the court was of the view that the respondent was 'entitled to see the provisions of the trust deed in order to check for himself whether his removal as beneficiary has been properly made in accordance with the provisions therein'. We have examined Her Ladyship's reasoning and we agree with them. Accordingly, we dismissed the appeal with costs.

[10] Before we elaborate on our reasons, we wish to put on record that both counsel have filed extensive written submissions in respect of the appeal; and counsel stand by those submissions. We note that these submissions are in fact similar to those articulated before the High Court.

PRE-ACTION DISCOVERY UNDER O 24 R 7A OF THE RULES OF COURT 2012

[11] The parties are in accord on the operation of the applicable provisions of the Rules of Court 2012. There is no issue on any procedural non-compliance of the terms of O 24 r 7A of the Rules of Court 2012.

[12] O 24 r 7A is a new provision inserted under the Rules of Court 2012. Under the old regime of the Rules of the High Court 1980, any person wishing to seek or obtain discovery or disclosure of documents prior to the initiation of action could only do so under the principles established in the House of Lords' decision in *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943; [1974] AC 133. Up until then, the courts did not order discovery against a person who is not a party to any proceedings, save at the trial and generally under pain of a *subpoena duces tecum* for the person in whose possession, custody or control the documents are with, to attend court as a witness and to produce such documents relevant to the proceedings. In *Norwich Pharmacal Co* emanated the principle that discovery may be ordered against defendants who are themselves not the wrongdoers but have somehow 'got mixed up in the tortious acts of others so as to facilitate their wrongdoing although through no fault of his own he may incur no personal liability but he

comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers'. And, even then, the action was instituted specifically to obtain discovery against the respondent there who were not themselves wrongdoers.

[13] O 24 r 7A is new specific provision enabling discovery in two situations. In the first scenario, discovery is sought prior to the commencement of action whereas in the second, it is sought after commencement of proceedings but against a non-party. The application for pre-action discovery is by means of an originating summons whereas in the latter, it is by means of a notice of application. O 24 r 7A reads as follow:

(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An Originating Summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall —

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to the subsequent proceedings in Court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identify of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or control.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

A (6) An order for the discovery of documents may —

(a) be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

B (b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

C **[14]** In summary, O 24 r 7A(3) requires an applicant seeking discovery of documents before action to:

(a) state the material facts pertaining to the intended proceedings;

D (b) state whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court;

(c) specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and

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(d) identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.

F **[15]** Under O 24 r 7A(7), the defendant is not compelled to produce a document if subsequent proceedings have already commenced; or where he has been served with a subpoena to produce at trial the very documents in question.

G **[16]** Given that O 24 r 7A is new provision under our Rules of Court 2012, the respondent had invited the court to consider the approach of the courts in Singapore on the operation and application of their equivalent O 24 r 7A, which is O 24 r 6 of the Rules of the Supreme Court 1990. Having considered them, we are not disinclined to follow them finding the cases cited persuasive

H as the procedural requirements on pre-action discovery are substantially similar.

I **[17]** The leading authority is the Court of Appeal's decision in *Kuah Kok Kim & Ors v Ernst & Young (a firm)* [1997] 1 SLR 169; [1996] 3 SLR (R) 485, a decision under the old O 24 r 7A, now amended to O 24 r 6. In that decision, the Court of Appeal of Singapore followed *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454 and expressed at p 493 that a plaintiff in a pre-action discovery application:

> ... has a duty to set out the substance of his claim to enable the potential defendant to know what the essence of the complaint against him is. This is because in the nature of pre-action discovery, the plaintiff does not know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer. Thus, the safeguards specified in the rules are to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition.

[18] The Court of Appeal in *Kuah Kok Kim* nevertheless opined that as long as the appellants 'stated the facts sufficiently to explain why pre-action discovery is necessary, this was adequate'. The Court of Appeal declined to impose too onerous a burden on the appellant other than what is already prescribed in the rules.

[19] Subsequently, Lai J in *Ching Mun Fong v Standard Chartered Bank* [2012] 2 SLR 22, held that an pre-action application is particularly appropriate where the applicant needs information or evidence 'to mount a claim, and not to fish for additional evidence to ground further causes of action':

> 8. What then is the purpose of pre-action discovery? In *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR (R) 485 ('Kuah Kok Kim') at p 31, the Court of Appeal explained that pre-action discovery is to assist a plaintiff who 'does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer'. The word 'viable' must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to 'complete his entire picture of the case'. If that was the case, the ordinary processes of general and specific discovery under O 24 rr 1 and 5 respectively would be subverted ... Instead pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings.

[20] Three cases were examined by Lai J; namely *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39; [2004] 4 SLR (R) 39 and *Ng Giok Oh and others v Sajjad Akhtar and others* [2003] 1 SLR 375 where the applications were refused; and *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] 1 SLR 321 where the application was allowed. In both *Asia Pacific Breweries* and *Ng Giok Oh*, the applicants already knew their causes of action and were not otherwise constrained from commencing proceedings. The applications were really to enable the applicants to assess or augment the strength of their case. In *Beckkett Pte Ltd* however, the position was somewhat different. The defendant bank (*qua pledgee*) had sold certain shares belonging to the applicant (*qua pledgor*). The application for pre-action discovery of documents relating to the 'details of the manner of sale of the pledged shares (whether by private treaty or auction)' was granted because the court found that without the information sought, the applicant would have no idea whether it had a basis to bring a claim against the defendant

for failing to take reasonable steps to obtain the best price.

[21] Further, Lai J was of the view that the Rules of Court:

> ... exists to provide a systematic and orderly process for the discovery of evidence leading to trial. The rule allowing for pre-action discovery complements this by helping potential plaintiffs to ascertain if they are in a position to commence proceedings: by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant.

[22] More recent is the decision of *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208, a decision on pre-action interrogatories but which the Singapore Court of Appeal opined that the principles there are 'broadly the same' for pre-action discovery; to which we agree. A discussion on this and some of the other cases above mentioned can be found in the judgment of Lee Swee Seng J in *Ahmad Zahri Mirza v PricewaterhouseCoopers Capital Sdn Bhd & Ors* [2015] MLJU 878; [2015] 7 CLJ 930.

[23] Before proceeding further, we pause to observe that we have examined all the authorities cited and save for the case of *Dunning v Board of Governors of the United Liverpool Hospitals,* the cases cited must be approached with some degree of caution. We find these cases distinguishable for material reasons. Paramount is the fact that none of the cases cited, whether from the United Kingdom or Australia, concerned considerations of the appropriate principles or tests for pre-action discovery. These cases are not in point as they simply do not involve applications for pre-action discovery of trust documents. Instead, the cases are Part 8 claims under Part 64 r 64.2(a) of the Civil Procedure Rules for the UK position. This specific procedure is available to anyone who is able to bring an action for the administration of a trust. In the Australian scenario, the cases involved direct actions against the trustees for production of certain books of accounts and records under the trusts. In both situations, the applicants have to establish sufficient interest before the specific remedy sought may be granted. Whether sufficient interest is shown depends very much on the construction of the trust in question. These cases discuss the matter of disclosure of trust documents in the context of actions already underway against defendants who are generally the trustees and who are called upon to account for their actions under the relevant trusts. This stage has not even been reached in the factual scenario of our instant appeal; and there is no equivalent provision under our Rules of Court 2012.

[24] The English position for pre-action discovery is now to be found under CPR r 31.16, which governs pre-action disclosure from the potential or intended defendant himself. The position there seems somewhat different from our O 24 r 7A as observed in *Dorsey James Michael*, case law suggests that the court must be satisfied on two principles before the discovery is ordered —

that there is a good arguable case on the material before the court at the time of the application; and that there is a good arguable case if the disclosure is ordered — see *Kneale v Barclays Bank plc (trading as Barclaycard)* [2010] EWHC 1900 (Comm). Disclosure will not be ordered if the court deems the case as 'over-speculative' — see *Anglo Irish Bank Corp plc v West LB A* [2009] EWHC 207 (Comm) . This is however, not the terms under our O 24 r 7A.

[25] There is yet another important distinction. In each of the cases cited, the applicants were also not seeking discovery of the very trust instrument but some other trust document. This is true whether we are looking at the leading case from the UK, the House of Lords' decision in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 or the earlier cases of *Clarke v Earl of Ormonde* (1821) Jac 108; *Re Cowin v Gravett* (1886) 33 Ch D 179; *In Re Tillott Lee v Wilson* [1892] 1 Ch 86; *O'Rourke v Darbishire and Others* [1920] AC 581; *Re Londonderry's Settlement* [1964] 3 All ER 855, and *Breakspear and others v Ackland and another* [2009] Ch 32. The position is the same with the Australian authorities of *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, *Rouse and others v IOOF Australia Trustees Limited* 2 ITELR 289; *Schreuders v Grandiflora Nominees Pty Ltd* [2014] VSC 310; *Sandra Stuart Curwen & Ors v Vanbreck Pty Ltd (as Trustee for the WS and NR Harvey Family Trust)* [2009] VSCA 284; *Re the Internine Trust and the Intertraders Trust; Sheikh Abdullah Ali M Alhamrani v Russa Management Ltd and others* [2004] JCA 158; and *Millar and another v Hornsby and others* 3 ITELR 81. In each of them, the applicant was aware of the terms of the trust under which the applicant took as beneficiary. What the applicant sought was discovery of accounts or proceeds of investments or trust assets/estate and for this, each applicant had to show sufficient interest in the matters complained of and the reliefs sought. Hence, some caution must be exercised when dealing with the matter of trust documents — the trust deed is a trust document; but so are for example, minutes of meetings, correspondence by the trustees, accounts and other records maintained by the trustees. All these relate to the trust and are broadly identified as trust documents. And, in almost all the cases cited, the discovery was in relation to these documents, and not the trust deed. This is distinctly different from the present appeal, where the application for discovery before commencement of proceedings is for sight of the trust deed which had established the trust in the first place.

[26] When we examine the deliberations of the House of Lords in *Schmidt v Rosewood Trust Ltd* more closely, we also noted that the distinction between discovery and action seeking particular information or discovery under Part 8 claims under Part 64 rule 64.2(a) of the Civil Procedure Rules, was picked up by the House of Lords. The facts in *Schmidt* are these.

[27] Schimdt had sued Rosewood Trust Ltd, a company which is in the business of providing corporate and trustee services, in June 1998 in the Isle of Man for alleged breach of trust and breach of fiduciary duty in relation to two settlements of which his late father was a co-settlor. Schimdt obtained an ex parte order which was subsequently varied by consent, which order, inter alia, provided for extensive disclosure of information. Schmidt filed a subsequent petition alleging that the disclosure made 'raised more questions than it answered' especially as some parts of the documents disclosed had been obliterated. He sought fuller disclosure of trust accounts and information about the trust assets by virtue of the discretionary interests which Schimdt claimed he had under the two settlements under O 41 of the Rules of the High Court of Justice of the Isle of Man 1952 which finds the modern equivalent under O 85 of the Civil Procedure Rules or CPR Schedule 1 available to anyone who is able to bring an action for the administration of trusts. The terms of the two settlements which established the two trusts (the Angora Trust and the Everest Trust) were known to Schmidt. What he did not know which is why he went to court was the detailed management of the accounts under the trusts. It is against that backdrop that Lord Walker of Gestingthorpe, delivering the judgment of the House of Lords discussed the right of a discretionary beneficiary to disclosure of the described trust documents.

[28] Lord Walker examined several decisions including the House of Lords' decision in *O'Rourke v Darbishire & Others.* In *O'Rourke*, a case concerning a trust established in 1884, the settlor, Sir Joseph Whitmore had made a will appointing three executors and he left his residuary estate to charity. By a codicil made in 1885, Sir Joseph altered his will to leave the ultimate residue to his executors for their own benefit with a precatory expression of his wishes that it should be used for charitable purposes. Two subsequent codicils extended the scope of the first. One of Sir Joseph's intestate successors threatened to challenge the will and the codicils. A compromise was reached between all interested parties. After all the executors and the intestate successors had died, the administrator of one of the intestate successors, O'Rourke, decided to challenge the will and the codicils on the ground of fraud by Darbishire, who was one of the three executors as well as Sir Joseph's solicitor. O'Rourke sought disclosure of documents containing legal advice given to Sir Joseph during his lifetime, and to his executors, after his death. O'Rourke's appeal was dismissed by the House of Lords not because he had no proprietary interest in the trust property, but because he had not made out even a prima facie case that the will and codicils were invalid or that the communications had been promoting fraud.

[29] What is perhaps helpful for our present purposes are the remarks of Lord Wrenbury on the matter of disclosure of trust documents. Lord Walker observed that Lord Wrenbury's remarks have been frequently quoted in

subsequent decisions see para 50 at p 729:

> The Board does not find it surprising that Lord Wrenbury's observations have been so often cited, since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence).

[30] These are Lord Wrenbury's observations in *O'Rourke v Darbishire & Others*:

> ... The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access documents which are your own.

[31] Lord Walker commented that Lord Wrenbury's remarks on the proprietary basis for disclosure were 'very apposite' on the facts of the case. According to Lord Walker, the same could also be said of the disclosure ordered in *Clarke v Earl of Ormonde* and *In re Cowin* although in the latter case, North J rejected the notion that the beneficiary had an absolute right as '... the particular interest of an individual beneficiary might in certain circumstances run counter to the collective interest of the beneficiaries as a body'. North J expressed the view that:

> I do not say that he is entitled as of right, but only that he is entitled under the circumstances, because there might be a state of circumstances under which the right to production would not exist.

[32] These observations of Lord Wrenbury and the House of Lords have been overlooked and it probably accounts for the misapprehension in the appeal before us, that the respondent has no rights or interests for discovery, especially as a former beneficiary, as he has no proprietary interest. A careful reading of the decision reveals that the House of Lords had actually rejected the notion that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in trust property; that the right to disclosure of trust documents was dependent on the existence of proprietary interest. The House of Lords was of the view that:

> ... the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to affixed and transmissible beneficial interest. The object of discretion (including a mere power) may also be

entitled to protection from a court of equity, although the circumstance in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion.

[33] The House of Lords looked at some Australian decisions before concluding that it was '... in general agreement with the approach adopted in the judgments of Kirby P and Shellar JA in the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v Rydge*', that a beneficiary's right to seek disclosure of trust documents 'is best approached as one aspect of the Court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. Their Lordships agreed with these two dissenting judges proceeding to further state that the Board did not see any reason to 'draw a bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character)'.

[34] In *Hartigan Nominees Pty Ltd v Rydge*, the Court of Appeal had found the approach using proprietary interest 'unsatisfactory'. According to Shellar JA, the inquiry as to the applicant's proprietary interest was 'if not false, an unhelpful trail' while Kirby P explained in the following terms:

> Access should not be limited to documents in which a proprietary right may be established. Such rights may be sufficient; but they are not necessary to a right of access which the Courts will enforce to uphold the *cestui que* trust's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees. I agree with Professor HAJ Ford's comment, in his book (with Mr WA Lee) *Principles of the Law of Trusts*, (2nd Ed) (1990) Sydney, Law Book Co, p 425, that the equation of rights of inspection of trust assets 'gives rise to far more problems than it solves' (at p 425): 'The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees ... The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts. It is the extent of that duty that is in issue. The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubts upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents'.

[35] The above discussion is particularly relevant if the respondent's application arose from proceedings against the appellant for sight of trust documents, period. Claiming as a beneficiary or former beneficiary, the claim

is for some order of right or entitlement to the trust documents and some accountability by the appellant to the respondent, as beneficiary. Were that the case, then the matters discussed above may rightly have some relevance and assistance in the consideration of whether a beneficiary or former beneficiary such as the respondent has any entitlement, proprietary or otherwise to the trust documents, after defining what the trust documents in question are. But, this is not the case here. This was a simple application for discovery or disclosure of trust documents prior to commencing proceedings, specifically provided for under the Rules of Court 2012. The Rules themselves provide for the terms and relevant tests when exercising discretion in such applications. It would be erroneous for the court to apply different considerations in such matters. The cases cited therefore are not relevant for the purposes of O 24 r 7A.

[36] Considering the appeal properly under O 24 r 7A, we are of the view that the whole intent behind O 24 r 7A is the saving of costs, resources and time if early discovery is ordered, in fact ordered even before proceedings are commenced. If discovery reveals that the applicant's concerns are unfounded, that in this case the respondent's termination or cessation as a beneficiary is proper and in accord with the terms of the trust deed, litigation can largely be avoided. This obviously means saving of both time and costs. We further agree with the observations of the Court of Appeal in *Dorsey James Michael* that even if litigation is unavoidable, there may still be savings of time and costs if the exercise helps in identifying the real issues, whether existing or anticipated. We also agree with the Court of Appeal that in determining whether an application ought to be allowed, three counter-constraints must be considered: the problem of 'fishing'; non-parties' reasonable explanation in maintaining confidentiality and privacy; and the danger that judicially administered orders for pre-action discovery can have the untoward effect of increasing the costs of dispute resolution as courts should not be seen as encouraging satellite litigation on claims that have not and/or may not be commenced — see para 26 at p 221.

[37] With those considerations, what O 24 r 7A then requires from the applicant is an explanation as to why pre-action discovery and not discovery in the course of action or proceedings is necessary. The requisites in O 24 r 7A(3) indicate that pre-action discovery is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant although we agree with Lee J in *Ahmad Zahri Mirza* when he said that if proceedings are not intended against the party on whom the discovery is sought, it does not mean that the application for discovery must be refused. Quite aside from the fact that O 24 r 7A does not stipulate such a requirement, some rationale for this conclusion can be derived from the tests found in rr 7A and 8 themselves and which will become more apparent when we examine the English case of *Dunning v Board of Governors of the United Liverpool Hospitals*,

which other than the Singapore authorities, is really the only case on point. What is more important in a pre-action discovery application is whether the defendant to the application, the appellant in the instant appeal, has in its possession, custody or power the documents sought to be discovered. It is the discovery of documents necessary to determine whether there is a viable cause of action for the plaintiff which is the focus of determination; and not so much the discovery of the persons who are to become defendants. After all, in the classic case of *Norwich Pharmacal*, the appellants at the House of Lords conceded that it did not have a cause of action against the respondent, the Customs and Excise Commissioners. Yet, the appeal was allowed and the orders of discovery against a party not intended to be a defendant in an intended action by the appellants for breach of their patent, were granted. At this stage of the application for discovery, the legal proceedings are only 'intended', although if the intended or draft pleadings are ready (hence the use of the term 'if practicable'), the same should be made available. The applicant or prospective plaintiff must provide the material facts pertaining to the intended proceedings or the substance of the potential claim. Say, if the claim is for a breach of contract, then sufficient material facts concerning the contract, terms of the contract, breach and so on and so forth, the elements required to constitute a cause of action. The applicant does not have to have all the material facts for if he did, the application may be argued to be redundant or outside the scope of r 7A.

[38] Insofar as the documents sought to be discovered are concerned, the documents must be specified or sufficiently described. All this is for practical purposes so that the order is capable of response and compliance from and by the defendant who is the appellant before us. The appellant must know the essence of the potential claim that is likely to be made against them. More importantly, the applicant must satisfy the court that the documents sought are relevant to an issue arising or likely to arise in the intended proceedings. If the documents can shed some light as to the question which vexes the applicant, in this case the respondent, as to whether he has a viable claim for being terminated as a beneficiary, then the application is properly initiated.

[39] Finally, the applicant has to identify the person having possession, custody or power over the documents sought although this averment may, in appropriate cases, be the same person who is a potential defendant.

[40] In the exercise of discretion, the court has to bear in mind not only the mandatory requirements of r 7A, but also to have regard to the provisions of O 24 r 8. Order 24 r 8 states:

> 8 On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make

such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. A

[41] This test of necessity for the fair disposal of the cause or matter or for the saving of costs pervades the operation of O 24, whether under the old or new procedural regime. Order 24 r 8 is an existing provision under the previous Rules of the High Court 1980, incorporated now under the new Rules of Court 2012 to include r 7A. The same requirements can also be found in O 24 r 13 on the production and inspection of documents. In *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105, a decision under the old O 24 r 13, the Federal Court held that where these conditions are met, and where the documents are relevant, then the documents which are in the defendant's possession must be produced notwithstanding 'the tens of thousands' of them. B C

[42] Therefore, in exercising discretion whether to grant discovery of specified or described documents in the possession, custody or power of the appellant, the respondent must satisfy the court that discovery of the same before filing of action against the appellant is indeed necessary, necessary at the particular stage of the application, and that is necessary because the order of discovery will allow for the fair disposal of the cause or matter or that it will lead to a saving of costs. The respondent must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made. Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action discovery seeks to achieve. Where the court is of the opinion that the applicant is unable to satisfy these conditions, certainly the court must dismiss the application as is apparent from the terms of r 8. D E F G

[43] When exercising discretion on whether to order disclosure, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, third parties, issues of personal and commercial confidentiality. Safeguards and limited or redacted disclosures may have to be imposed. This approach, described as one of 'balancing competing interests' was preferred by the New South Wales Supreme Court in *Avanes v Marshall & Ors* [2007] NSWSC 191, over the proposition that a beneficiary's entitlement is as of right to disclosure of any document. H I

[44] All these observations, as we had pointed out at the start of our discussion on these authorities cited by the parties, are observations made in cases where actions are already afoot pursuant to specific procedure under the

CPR. In *Re Cowin*, the action was by a beneficiary against the trustee seeking a declaratory order that he is inter alia entitled as of right to inspect all deeds, papers and documents relating to the trust property which were held by the trustees. Further, in *Re Londonderry's Settlement*, action was already commenced by a beneficiary who was seeking a declaration that the defendant trustees of a settlement were bound to disclose to the beneficiary certain identified documents which effectively required the trustees to disclose the reasons for actuating certain discretionary decisions. The English Court of Appeal ordered restricted disclosure or disclosure on terms, that is 'covering up' those parts of the trust documents which the beneficiary was not entitled to be shown. This would include documents relating to the deliberations of the trustees as to the manner in which they should exercise their discretionary powers under the trust or their reasons for the same.

[45] Coming then to the decision of the Court of Appeal in *Dunning v Board of Governors of the United Liverpool Hospitals*, the case is actually instructive on the understanding of the underlying principle in pre-action discovery. It is a case decided under the old O 24 rr 7A and 8 of the Rules of the Supreme Court, similar to our provision, the only difference being the procedure was only available to personal injury claims. In this case, Mrs Dunning, 56 years of age and who enjoyed good health all her life developed a cough in 1963. She was admitted to the Royal Infirmary at Liverpool for further investigations. During the first two or three weeks of her admission, she appeared to improve. Thereafter, her condition worsened considerably. She finally left the hospital with an impaired memory and difficulty in walking. Her condition continued to worsen and eventually she was examined by a consultant physician who asked to see the hospital notes. The hospital refused to divulge the notes.

[46] On application to court, discovery was ordered by the court and this decision was upheld on appeal. In affirming the lower court's decision, the Court of Appeal held that one of the objects of the rule ordering pre-action discovery was precisely to enable a plaintiff to find out before he starts his action, whether he has a good cause of action or not. Lord Denning MR held that this object would be defeated if the plaintiff 'had to show — in advance — that he had already got a good cause of action before he saw the documents'. Mrs Dunning will not know whether she had a worthwhile cause of action until she got hold of the medical reports and case notes.

[47] Similarly, in the appeal before us, the respondent will not know if he has a worthwhile cause of action until and unless he sees the trust deed. This is the trust document that he particularly necessarily needs to see and to consult his lawyers over. If the legal advice is in the negative as to further legal action, then it meets fully with the objectives of O 24 rr 7A and 8. If there is legal action thereafter, the likelihood of more defined areas of dispute is good enough for

the purpose of determining whether this pre-action discovery ought to be allowed. We agree with the learned High Court judge that it is just and fair to order disclosure. If there are parts of the trust deed that do not concern the respondent, appropriate measures may be put in place to ensure confidentiality and protect the interests of other beneficiaries. The learned High Court judge had had sight of the trust deed and she has properly satisfied herself that the trust deed should be disclosed to the respondent on the terms she had imposed. That exercise of discretion is just and correct on the facts presented. We can only agree that upon sight of the trust deed, the question that troubles the respondent as to the cessation of his receipt of benefits under the trust deed can be answered if not fully, substantially.

[48] Although the learned judge did not quite articulate the test for grant of discretion in the terms discussed above, Her Ladyship rightly understood O 24 r 7A to be 'wider than the *Norwich Pharmacal's* order'. It was the view of Her Ladyship that it was a question of appropriateness or otherwise to order disclosure in the circumstances of this case to which the court answered in the affirmative finding it just and fair to grant the orders sought but on terms. We agree with Her Ladyship's exercise of discretion, both on the law and on the facts.

[49] The respondent was seeking sight of the trust deed and other trust documents related to the Tee Keong Family Trust. He was not seeking discovery or sight of any other trust, and there was more than one trust set up by his late paternal grandfather as is evident from his will, a copy of which was exhibited — see 'exh BL1'. Given that the respondent is unquestioningly a member of the Tee Keong family under whose name the trust is named, he is entitled to sight of those documents identified.

[50] The removal of the respondent as a beneficiary under the trust deed vide endorsement to memorandum No 8 does not, in our view, alter that right to the extent of extinguishing that entitlement. More so when the discovery is sought for the purpose of considering litigation to challenge such removal and cessation of entitlement, even if and including one under a discretionary trust. The respondent was not given any reason for his removal as beneficiary except shown the memorandum No 8. We have examined the endorsement vide memorandum No 8 and it states:

> BE IT REMEMBERED that on the 18th day of March, 2014 we, Infoline Sdn Bhd (Company No 13625-T) as trustee of The Tee Keong Family Trust have declared that Lim Keong Ho shall cease to be a Specified Beneficiary and a General Beneficiary of the trust to take effect from the same day pursuant to Clauses Q4 and Q5 of the trust deed.

[51] Reading the terms of memorandum No 8 in fact throws up more questions than it yields answers. Not only was the respondent a 'specified beneficiary', he was also a 'general beneficiary of the trust'; whatever that may mean under the trust deed. The removal is also said to be pursuant to 'Clauses Q4 and Q5 of the trust deed'. To compound it all was the appellant's contention that the Tee Keong Family Trust is a discretionary trust. Now, how is anyone to understand and appreciate the trust, and the proper meaning and exercise of the acts in question including the matters specified in memorandum No 8 without benefit of the very trust document which provided for those terms, is beyond comprehension. Surely it cannot be left to the keepers of the trust and the trust documents to say, 'We say so' without more. Had the trust document or the details of the trust been made available or known to the respondent prior to his removal as beneficiary on 18 March 2014, perhaps there may be some room for the appellant's argument. There was none and there is no suggestion that the respondent ever had sight of the trust deed. Neither is it suggested that the respondent was aware of the details, or that he is in possession of sufficient details of the trust deed to know the reasons for his removal other than being shown memorandum No 8 which we have ascertained reveals effectually nothing much; certainly not enough for him to take legal advice and commence litigation. Hence, his request for discovery pre-action. The respondent's right to sight the trust deed is not dependent on whether he is still a beneficiary. Fairness and fair play, part of the duty of the court in dispensing justice requires that the respondent be granted discovery of the necessary trust documents. We agree with Her Ladyship that it was 'just and fair' that the respondent be allowed discovery on terms.

[52] We also agree with the observations of the learned judge that based on the case authorities cited, beneficiaries do indeed have a right to seek disclosure of trust documents. In this regard and for the purpose of this appeal, we would understand the term 'trust documents' to refer only to the trust deed and any other document that set up and established the trust. It does not refer to other documents which may be related to the execution of various actions or decisions under the trust, after it has been set up; such as accounts. Hence, the trust documents here would necessarily refer to the trust deed. It is this document that the respondent sought discovery of prior to filing any action. He wanted sight so that he could obtain legal advice on the validity of his termination as beneficiary. The substance of the appellant's objection is that the respondent is not entitled to discovery of the trust deed because he is no longer a beneficiary; so he has no proprietary interest in and to the trust deed for which he can ask the court to order discovery. Even if he was still a beneficiary, he still does not have this entitlement.

[53] To this end, *Lewin on Trusts* (18th Ed, 2008) Sweet & Maxwell at paras 23–80 offers clear opinion on the rights of former beneficiaries to the

instrument of their removal:

> Where a person has been removed or purportedly removed as a beneficiary under a power, the beneficiary might normally expect to obtain disclosure of the instrument exercising or purportedly exercising the power, so that he can be satisfied that he is no longer a beneficiary.

[54] Even on documents other than the trust deed, the same author opined that there 'is no reason why a beneficiary should not, merely because his interest has come to an end, obtain an order for disclosure of accounts and other information relating to the period while his interest still survived and as to which the trustees remain accountable to him'. The respondent has offered the circumstances for his claim, that the exclusion 'appears strange and illogical that I can be excluded from a trust set up by my late grandfather precisely for the purpose of benefitting my father's family which of course includes myself'; and 'even if Infoline has the power to exclude me as a beneficiary, the timing of my exclusion appears to suggest that Infoline has exercised its power (if at all it exists) capriciously or unreasonably'. The exclusion took place shortly after his father passed away. The respondent explained that he was unable to comment more because he does not know what the trust deed says. He further explained that he was not sure if his two young children are also beneficiaries. We find the concerns fair and justified as the respondent and his children, at this stage are undeniably members of the Tee Keong family and by implication, the Tee Keong family trust. We agree with the respondent that he needs the trust deed in order to investigate whether the appellant has the power to exclude him as beneficiary and if so, when and under what conditions. The respondent has adequately and sufficiently explained the basis of his concerns and his application.

[55] We agree with the learned judge that the explanation proffered meets the requirements of O 24 r 7A for pre-action discovery. Sight of the very document which created his entitlement and taking away of that entitlement is surely necessary and just to the issue of whether an exercise of exclusion is proper or otherwise. The contents of the trust deed will and should have the basic elements of a trust clearly set out, and the terms should address the respondent's queries and quandaries. After all, the appellant themselves relied on its terms, cll Q4 and Q5, whatever they may be or state, for the validity of their actions. If the exercise is proper, and we do not for a single moment think it may not be and that is a matter entirely for another exercise should the respondent commence legal action after taking proper legal advice; justice and necessity, the whole intent behind O 24 r 7A dictates that the pre-action disclosure sought by the respondent be granted. The respondent can then take proper legal advice on whether the appellant has the power to exclude him as a beneficiary and/or whether the appellant has exercised its powers, if all such powers exist, capriciously or unreasonably. This is regardless the appellant's

A assertion that the respondent is but a discretionary beneficiary. The meaning and intent of that status can only be determined by necessary reference to the trust deed. The respondent has further identified the appellant as the 'most likely party to the intended action' over his cessation or exclusion as beneficiary. The appellant undeniably has the trust deed in its possession, custody or power. B All the terms and conditions of O 24 r 7A are met. The order for disclosure is therefore entirely proper in law and on the facts.

[56] Consequently, the appeal is without merit and the appeal must be dismissed. We accordingly order the dismissal of the appeal together with costs C of RM30,000. The judgment of the learned High Court judge is hereby affirmed and the deposit is returned to the appellant.

Appeal dismissed with costs of RM30,000; judgment of learned High Court judge affirmed.

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Reported by Dzulqarnain Ab Fatar

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